

29 April 1980

DOJ review(s) completed.

On file OSD release instructions apply.

MEMORANDUM FOR: See Distribution

STATINTL

FROM:

[Redacted]

Assistant Legislative Counsel

SUBJECT:

H.R. 6410, "Paperwork Reduction
Act of 1980"

REFERENCE:

OLC 80-0824/2 dtd 28 April 1980

To further assist in your preparation for Friday's meeting (see reference), I am forwarding attached the following documents:

Tab A: 25 April 80, DOJ views letter to OMB re H.R. 6410

Tab B: 7 March 80, DOD views letter, Chairman, House Government Operations Committee, cleared by OMB; and,

Tab C: AF Chart detailing AF comments and proposed solutions.

STATINTL

[Redacted]

Attachments

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RJW/lmb (29 April 80)

STATINTL



United States Department of Justice
ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

WASHINGTON, D.C. 20530

25 APR 1980

Honorable James T. McIntyre, Jr.
Director
Office of Management and Budget
Washington, D. C. 20503

Dear Mr. McIntyre:

The Department of Justice has been asked by Chairman Ribicoff to comment on the "Paperwork Reduction Act of 1980" (H.R. 6410 and S. 1411). We prefer at this point to present our objections to the bill to OMB so that we may facilitate acceptable compromises that will allow us to support the bill.

The Department of Justice supports the effort to reduce the paperwork burden which the federal government imposes on the public unnecessarily. To the extent that any of our forms or questionnaires are answered by the general public for statistical purposes (e.g. those sent out by the Law Enforcement Assistant Administration and the Immigration and Naturalization Service), they are cleared by OMB in compliance with the Federal Reports Act of 1942 (44 U.S.C. § 3501 et. seq.). H.R. 6410 would, however, distort the purpose of paperwork reduction by broadening, perhaps unintentionally, its application to include information gathered for law enforcement and litigation purposes.

The most objectionable departure from the Federal Reports Act of 1942 lies in the definition section. Under present law, "information" is defined as "facts obtained or solicited by the use of written report forms . . . which are to be used for statistical compilations of general public interest." (44 U.S.C. § 3502, emphasis added). H.R. 6410 broadens the definition to include ". . . facts or opinions for any purpose . . ." (§ 3502(2), emphasis added). This language is intended to cover all information requests sent to ten or more persons (see House Rep. No. 835, 96th Cong., 2nd Sess. (1980) p. 19). Presumably that would include subpoenas, interrogatories, Civil Investigative Demands, (C.I.D.s) and information necessary for criminal law enforcement. A provision which mandates that, for instance, every interrogatory sent to ten persons (even if members of the same corporate defendant) must be cleared by OMB is not only a logjam to efficient judicial proceedings but, more importantly, is an intolerable interference in the conduct of civil and criminal investigation and litigation. It would also be

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politically inadvisable for OMB to begin to make investigation and litigation decisions by approving or disapproving interrogatories.

We do not believe that the delegation authority as provided in § 3507(e) of the bill is sufficient to quell our objections. Even if the Director delegates to the Attorney General the power to "approve" all information requests, such delegation may only be valid for three years and is subject to rescission at any time. Furthermore, § 3507(e) merely allows delegation of the power to "approve" and does not remove the obligation to submit the collection requests to OMB, nor does it exempt the information received from dissemination to other agencies. Civil Investigative Demands, for example, are confidential by law (15 U.S.C. 1311 et. seq.) and to reveal their contents to OMB even for the purpose of approving them, would violate statute's intent. The provisions in the bill for sharing the information with other agencies are subordinated to other laws protecting confidentiality (e.g. § 3510). The provisions for submission and approval have no such protection. In fact, all information collection requests are to be published, regardless of their confidential nature, in the Federal Register according to § 3507(a)(2) of the bill.

The final fear we have concerning approval by OMB of our information collection requests lies in § 3512 of the bill. This provision allows any recipient of an uncleared C.I.D., for example, to refuse to answer without fear of being held in contempt of court. Unless litigation-related information collections are exempted from the bill, the Government's opponents in litigation will have an unexpected bonus. At the very least, the effective dates of § 3512 and the bill in general (Sec. 5) should coincide.

On a related minor point, we would like the legislative history of the definition section to explain that the bill is not meant to cover information requests sent to other federal agencies or agents. The definitions in H.R. 6410 do not make that clear.

The second major area of concern is § 3510 which empowers the Director of OMB to direct an agency to share the information garnered. If the definition of collection of information is changed to exempt those requests sent for law enforcement, litigation, or intelligence purposes, we would have no objection to § 3510. Absent such change, we are troubled by its ambiguous language. It is not clear whether the Director may only direct access to another agency if all three conditions are met or if one of the three conditions are met. Specifically, if the information is protected, for example, by Sec. 229 of the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. § 5639) may it still be released under subsection (3) of § 3510 of the bill if the person who supplied the information consents to the disclosure, even if that person was not the juvenile

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involved? If the answer is "yes", the Department of Justice objects and submits alternative language herein.

Our third major objection concerns granting access to the Director under § 3515 and to the General Accounting Office (GAO) under § 3519 of the bill.

§ 3515(b) states that each agency "shall" furnish access to all information to the Director if the Director determines it necessary, unless such access is prohibited by law. Our proposed amendment to § 3515 addresses our concerns. We would also like the legislative history to point out that the burden would be on the Director to prove that each specific piece of information he seeks is necessary to performance of his duties under this Act. The legislative history should also give examples of the types of laws that prohibit forced access such as the Privacy Act, (5 U.S.C. § 552a), the exemptions to the Freedom of Information Act (FOIA) (5 U.S.C. § 552(b)), the Justice System Improvement Act of 1979 (42 U.S.C. 3789g), the Juvenile Justice and Delinquency Prevention Act of 1974 (42 U.S.C. 5639), and, of course, the Federal Rules of Evidence, Civil, and Criminal Procedure, as well as 28 C.F.R. 1.6 which flows directly from the Constitution and limits disclosure of information used by the President in exercising his power of pardon. This is not an exhaustive list but indicates the type of information currently protected by law.

These limitations are crucial because of the relationship between § 3515 and § 3519. If the Director has access to all the information of an agency (§ 3515) and the ". . . Comptroller General shall have access to all books, documents, papers, and records of that Office [of Federal Information Policy within OMB]" (§ 3519), it may defeat the effect of the General Accounting Office Act of 1980 which, inter alia, allows an agency to withhold information exempted from disclosure under FOIA. Under the scheme of this bill, the GAO would gain access through the Director to information it could not receive under present law. Therefore, § 3519 should limit GAO to the access and process it possesses under current law. Without that qualification, an agency might be justified in refusing access to the Director on the grounds that GAO would have access not otherwise available.

We have one last objection to H.R. 6410 concerning the power of the Director to designate one agency the central collection agency (§ 3509). In the case of parole determinations, investigative activities are assigned on a case-by-case basis among the Parole Commission, the Administrative Office of United States Courts, the Bureau of Prisons and other investigative agencies. It is the role of the Parole Commission to determine what information is necessary to make a parole decision (18 U.S.C. 4204(b)(4)). Investigations for probation recommendations are made by the Administrative Office of United States Courts, a branch of the Judiciary.

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The approval or disapproval by OMB of such information collection may constitute an encroachment into the powers of the judicial branch.

Furthermore, the Parole Commission must often make quick information requests in connection with parole revocations. This would not be possible if the Parole Commission were not designated the collection agency or it had to wait as much as 60 days for OMB approval.

Those are our concerns with H.R. 6410. Enclosed are suggested amendments which we hope you will support. Thank you for your prompt consideration. Please contact me if you have any questions.

Sincerely,

Alan A. Parker
Alan A. Parker
Assistant Attorney General

Enclosure

Amendments

§ 3502

"(2) 'collection of information' means the obtaining or soliciting of facts or opinions for any purpose other than law enforcement, litigation, or foreign counterintelligence, by an agency . . .

§ 3510

"(a) The Director may direct an agency to make available to another agency information obtained pursuant to an information collection request, provided that such disclosure is not inconsistent with any applicable law, if

"(1) it is disclosed in the form of statistical totals or summaries; or

"(2) all persons to whom the information pertains consent to such disclosure.

§ 3515

"(b) Upon the request of the Director, each agency shall furnish to the Director and give him access to all information in its possession which is necessary for the performance of his functions under this chapter, provided that an agency need not furnish access to information which the agency may refuse to make available under law.

§ 3519

strike the period at the end of the section and insert:

unless the information contained in such books, documents, papers and records could be withheld from disclosure to the Comptroller General by an agency pursuant to the General Accounting Act of 1980."



March 7, 1980

Honorable Jack Brooks
Chairman, Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your request for the views of the Department of Defense on H.R. 6410, 96th Congress, a bill "To reduce paperwork and enhance the economy and efficiency of the Government and the private sector by improving Federal Information policy making and for other purposes".

[The legislation is designed to provide a means to eliminate unnecessary paperwork burdens that are imposed on the private sector and within the Government as a result of information collection requirements. To accomplish this, the bill establishes an Office of Federal Information Management Policy within the Office of Management and Budget. That Office would be responsible for providing overall direction in the development and implementation of Federal information policies, standards, and guidelines. This would include responsibility to review information collection requests, establishing procedures to reduce paperwork burdens on the public, and establishing procedures for review of Federal statistical and records management procedures, establishing guidelines for ensuring privacy of records, interagency sharing of information and the use of automatic data processing as a means of managing information.

In addition, the bill establishes a Federal Information Locator system that would contain data concerning the information holdings of the government. The system would be designed so that information contained in the system could be used to eliminate duplicative information and reporting requirements.] Subject to the following comments, the Department supports the legislation.

The bill is written so that it would apply to every agency of the Government and would include agencies engaged in intelligence collection and related activities. This could result in the disclosure of information related to the intelligence and counterintelligence activities of the Government. Accordingly, to ensure that this result does not occur it is recommended that the bill be amended by adding the following new section:

"None of the provisions of this Chapter shall require the disclosure of information that is specifically authorized under criteria established by an Executive Order to be classified in the interest of national defense or foreign policy and is in fact properly classified pursuant to such Executive Order or of information concerning the intelligence or counterintelligence activities of the Government."

While the foregoing should be sufficient to protect classified information, the broad powers granted to the Office of Federal Information Policy could have an unintended adverse effect on the intelligence and cryptologic activities of the government in view of the extensive powers granted to the Office to prescribe policies, standards, guidelines concerning information management; to coordinate agency proposals with respect to the acquisition and use of automatic data processing and other technology for managing information; and to oversee policy, standards, and guidelines on safeguarding the security of information and to provide guidance about information security. Accordingly, your Committee may wish to consider exempting agencies of the Intelligence Community from the bill. This could be done by excluding them from the definition of an agency in section 3502 of the bill.

The Department of Defense considers that the provisions of the bill would apply to both information requirements imposed on the public and on internal information requirements. While the Department believes that general policy concerning collecting information both inside and outside the Government should be compatible, an agency should be able to determine what information it needs to collect internally and such determinations should remain the prerogative of the agency concerned. Therefore, it is recommended that sections 3504

and 3507 of the bill be amended by inserting "from the public" after "information collection requests" in line 5 of section 3504 on page 7 of the bill and "of information" in line 4 of section 3507 on page 17 of the bill. Alternatively, the Committee may wish to change the definition of "collection of information" by amending subsection 3502(2)(A) of the bill by inserting "other than an agency, instrumentality or employee of the agency concerned in" after "ten or more persons" in line 7 on page 4 of the bill.

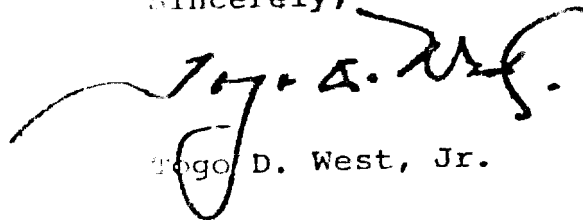
The Department of Defense is pleased to note that section 3505 of the bill directs that a proposal be developed to augment the existing Federal Information Locator System so that it will include data profiles of major information holdings of agencies. In view of the provisions of section 3504(a) concerning the interagency sharing of information, we assume that the data profiles would cover both information collected internally as well as information collected from other government agencies. To make this clear, we recommend that the phrase ", obtained either from internal agency sources or from other government agencies" be inserted between "agencies" and "(used in the conduct of their operations)" in lines 20 and 21 on page 13 of the bill.

In section 3506 of the bill a requirement is imposed upon all agencies to designate a senior official of the agency who will report directly to the head of the agency and who will carry out the functions and responsibilities of an agency under the provisions of the bill. While the Department supports the concept that a senior official should be responsible for implementing the provisions of the bill, there are occasions when it makes more sense, from an operational and management standpoint, to designate more than one senior official to be responsible to the head of an agency. For instance, within the Department, the Assistant Secretary of Defense (Comptroller) is responsible for establishing policies for information collection, reports and forms control, statistical activities, records management, automatic data processing, and the protection of privacy of individuals. The Assistant Secretary of Defense (Communications, Command, Control and Intelligence) is responsible for establishing telecommunications policy because telecommunications systems, hardware, and research functions are more compatible with the intelligence, research, and engineering activities assigned to that office. To

permit an agency to designate more than one official to carry out the responsibilities of the bill where sound management principles dictate such an arrangement, it is recommended that section 3506 of the bill be amended by striking out "a senior official who reports" and inserting "one or more senior officials who will report" in line 20 on page 15 of the bill and by inserting "or officials" after "the official" in line 12 on page 16 of the bill.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

A handwritten signature in dark ink, appearing to read "Togo D. West, Jr.", with a stylized, flowing script.

Togo D. West, Jr.

BILL AND HOC REPORT

COMMENT

PROPOSED SOLUTION

1.a. HR 6410

1.a. Within many of the agencies,
it would
be impractical to assign
responsibility for all information
management to single office.

1.a. Recommend the addition of "(or
officials)" after "... a senior
official" in 3506(b). Likewise, change
"... the official" in 3506(c)(4) to "an
official."

(1) SECTION 3506(b)

The Head of each
agency shall designate...a
senior official who reports
directly to such Agency Head to
carry out the responsibilities
of the agency under this
Chapter.

(2) SECTION 3506(c)(4)

Assign to the offi-
cial designated under Subsection
(b) the responsibility for the
conduct of and accountability
for any acquisitions made pur-
suant to a Delegation of Authority
under Section 111 of the Federal
Property and Administrative Services
Act of 1949 (40 USC 759).

b. HOC REPORT (page 6, last para)

It is also expected that a cer-
tain restructuring of activities may
be required within the agencies. The
committee expects that each agency
will reorganize, to the extent neces-
sary, so that the counterpart activities
within the agency to those assigned to
the OMB Office of Federal Information
policy will report directly to the
Senior Official designated by the agency
head.

b. A standardized organizational
structure based upon functional
disciplines does not necessarily
mesh with an objective or mission
oriented organization. The functional
activities and their controlling
structure should not drive or force
the mission structure.

b. Ensure the House/Senate
Conference Report does not require a
reorganization of federal agencies to
reflect a functional matchup with the
Office of Federal Information Policy.

BILL AND HGOOC REPORT

COMMENT

PROPOSED SOLUTION

2. MILDEP AUTHORITY

a. HR 6410, Section 3502(1)
"Agency" means any Executive department, military department, Government corporation, Government controlled corporation, or other establishment in the Executive Branch...

2. Though the Bill states the MILDEPs are agencies empowered to receive delegations from OMB under the Bill, the report implies that the MILDEPs are only constituent agencies, that the designated senior official for delegation purposes exists only at the OSD level, and that a service would not be empowered to receive delegations under the Brooks Act and HR 6410, should the latter become law.

2. Ensure that "agency" as defined in the Bill is the operable term, particularly with respect to OMB and GSA authority delegations. This may be accomplished in the House/Senate Conference Report. MILDEP use of this authority will still be subject to OSD control through DODDs 5000.1, 7920.1, etc.

b. HGOOC Report (page 7, 3rd & 4th paras)

The appropriate structure under HR6410 is somewhat different in the case of a Government department having constituent agencies, such as the Department of Defense. The committee expects that each constituent agency will establish a central Information Management Unit, subject to the review and approval of the departmental-level unit headed by the designated senior official...HR 6410 permits the OMB Director to delegate the responsibility of approving proposed information collection requests to the ...senior official... (and) the Bill does not permit that official to redelegate his approval authority.

c. HGOOC Report (page 8, 1st para)
(For delegations under the Brooks Act) HR 6410 requires that any such delegations by GSA to the agencies be made to the Senior Information Management official designated under this legislation.

BILL AND HCOOC REPORT

COMMENT

PROPOSED SOLUTION

3. AGENCY RESOURCE ACQUISITION AND USE

a. HR 6410, Section 3504(g)

The Automatic Data Processing and Telecommunications functions of the (OMB) Director shall include --

.
. .
.

(3) Providing, in coordination with the Administrator of General Services, advice and guidance on the acquisition and use of automatic data processing and telecommunications equipment, and coordinating, through the review of budget proposals and otherwise, agency proposals for acquisition and use of such equipment

b. HCOOC Report (page 10, 2nd & 3rd paras)

(INFORMATION) technology includes, but is not limited to, computer technology, communications technology, and related information handling, storage, and retrieval technology...it is the intent of the committee that word processors and other kinds of technology for handling information be covered for purposes of HR 6410 and the Brooks Act.

a. Computers and communications are tools for a broad spectrum of governmental activity ranging from simple information management to complex weapon system control and delivery. By recognizing these technologies as tools solely of information management, an inappropriate control mechanism is placed over their acquisition and use with respect to other missions.

b. The Brooks act, PL 89-306, concerns the "...purchase, lease, and maintenance of automatic data processing equipment by federal agencies. Moreover, the Act provides that "the (GSA) Administrator shall not interfere with, or attempt to control in any way, the use made of automatic data processing equipment or components thereof by any agency." (5 USC 630(g))

a.(1) Delete 3504(g)(3); or

(2) Change 3504(g) to read "The automatic data processing and telecommunications functions of the Director shall apply solely to information management systems and not DOD command and control, weapon, or intelligence systems and shall include..."

b. Ensure that the House/Senate Conference Report reflects the Brooks Act coverage as stated in Public Law 306 and the legislative history (HGX Report on HR 4845).

BILL AND HGOC REPORT

COMMENT

PROPOSED SOLUTION

4. GSA MANAGEMENT OVERSIGHT ROLE

a. HR 6410, Section 3513(a):

The (OMB) Director shall, with the advice and assistance of the Administrator of General Services, review, at least once every 3 years, by means of selective inspections, the information management activities of each agency to ascertain their adequacy and efficiency...

a. By redirecting GSA's mission focus from "service" to "management oversight" the Bill deprives the federal agencies of a much needed service organization. GSA has already allowed to lapse most of their ADP requirements contracts. GSA audits are unnecessary as agency management audits may be conducted by the GAO or internal audit groups using standards developed by OMB.

a. Delete ", with the advice and assistance of the Administrator of General Services,"

b. HGOC Report:

(1) Page 15, 4th para:

... GSA must reorient its management philosophy, which emphasizes its service role as opposed to its management oversight function...GSA should act as the Government's operational manager of ADP resources...include(ing) reviewing agency procurement justifications to insure compliance with Government ADP policies and regulations prior to the acquisition of ADP resources by the agencies.

b. PL 89-306 states that GSA shall not interfere with the determination by agencies of their ADPE requirements or with the use made of ADPE by any agency. By having GSA review agency need justifications, the Bill makes GSA a limited partner to agency acquisitions. This is unnecessary, counter to the legislative history of the Brooks Act which states that "agencies would maintain their present independence in the determination of ADP requirements," and would create a conflict of interest for any oversight role envisioned for GSA.

b. Ensure that the House/Senate report recognizes the primary importance of GSA as a service organization and reemphasizes the restrictions on interference in agency resource requirements as stated in the Brooks Act and associated legislative history.

(2) Page 6, 4th para:

GSA, in its reviews of requests for authority to acquire information technology, is to review the need for the technology and whether it will improve the agency's operations.

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USE ONLY☐ CONFIDENTIAL☐ SECRET

ROUTING AND RECORD SHEET

SUBJECT: (Optional)

STATINTL

H.R. 6410, "Paperwork Reduction Act of 1980"

FROM:

Deputy Chief, Information Services
Staff, DDA
5B2830 Headquarters

EXTENSION

NO

ISS 80-238/5

DATE

30 April 1980

TO: (Officer designation, room number, and building)

DATE

OFFICER'S
INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

RECEIVED

FORWARDED

1. Director of Communications
2. ✓ Director of Data Processing
3. Director of Finance
4. Director of Logistics
5. Director of Medical Services
6. Director of Security
7. Director of Training
- 8.
- 9.
- 10.
- 11.
- 12.
- 13.
- 14.
- 15.

As you can see from the attached memorandum, a meeting has been scheduled for Friday, 2 May, to discuss the implications of subject Bill.

Prior to our attending that meeting, we would appreciate your comments regarding this legislation. We would appreciate receiving your comments - either written or by telephone - by Thursday, 1 May 1980.

We apologize for the short deadline and realize you may not have sufficient time to thoroughly review the proposal. We would, however, appreciate any comments or reactions you may have. As you can see, we only received notice of the upcoming meeting yesterday.

STATINTL

Attachments

STATINTL

GG